MARSHAL PERERA AND OTHERS
v.
DONA AGINIS AND ANOTHER

COURT OF APPEAL.
GOONEWARDENE,J. AND VIKNARAJAH,J.
CA No. 693/73 (F) No. 694/73.
D.C. COLOMBO 7464/P.
FEBRUARY 15 AND 17, 1988.

Partition action–Undivided share fraction of larger land in relation to the same fraction of a divided portion of it.

A purchaser who acquires an undivided share of the land is only entitled to the same undivided share of any specific portion of such land where the portion of that portion is under consideration. Where a deed deals with 1/7 share of a 1/2 share of the larger land, it will convey only a similar share of that portion that is 1/4 share.

Where as a result of a mutual mistake the parties have expressed in the deed an intention different from their actual intention, the Court has power to give relief. The question then relates not to the construction of a deed but to the nature and extent of the Court's power to give relief against mistake.

Cases referred to:
(1) *Girigoris Perera* v. *Rosalin Perera (1952) 53 NLR 536.*
(2) *Fernando* v. *Fernando (1922) 23 NLR 266.*

APPEAL from judgment of the District Court of Colombo.

Appellants absent and unrepresented in CA 693/73(F).
N. R. M. Daluwatte P.C. with *L. Jayawickreme* for 9th defendant-appellant in C.A. 694/73.
P. A. D. Samarasekera P.C. with *G. A. Geethananda* for plaintiff-respondent in C.A. Nos. 693-694/73.

March 24, 1988.

VIKNARAJAH, J.

Plaintiff-Respondent instituted this action to partition the land called Moragahalanda alias Alubogahalanda containing in extent A.5 R.2 P.0 which land is depicted in plan No.130 dated 5.11.1955 marked X and the extent according to this plan X is A.6 R.2 P.24.

Appeal No. 693/73 is by the 27th, 23rd and 38th–44th defendant-appellants. This appeal is abated because neither the appellants nor their Attorney-at-Law have deposited the requisite brief fees.

Appeal No. 694/73 is the appeal of the 9th defendant-appellant who was represented by Counsel at the hearing to this appeal.

Counsel for 9th defendant-appellant submitted that the identity of the corpus has not been proved. It was pointed out by Court that at the commencement of the trial it was admitted by parties that corpus depicted in Plan X was the land sought to be partitioned and it was also admitted that Geekiyanage Daniel was the owner of the corpus and that on his death his heirs were his widow Isohamy and eight children Abraham, Ketchohamy, Menike, Manchohamy, Elisahamy, Podinona, Saradiel, James (1st defendant). Thereafter Counsel for appellant did not pursue this submission.

The 9th defendent is claiming rights under Ketchohamy. According to the plaint the 9th defendant who has no manner of right title or interest is in possession of a portion of this land.

The 9th defendant claimed at the trial for himself and his brother and sisters viz. 23D, 24D, 25D and 26D a half share of the corpus and another half an acre.

The learned District Judge has held that 9th defendant and 23-26D are entitled only to 1/14th share of the corpus.

The present appeal is in respect of this finding. According to the 9th defendant Geekiyanage Dona Simon was the original owner of two adjacent and contiguous lands then called and known as Moragahakanatte and Alubogaha Kanatte in extent about 18 acres and later these two lands came to be known as Moragahalanda and/or Moragahawatte and Alubogahalanda and/or Alubogahawatte. Simon died leaving as his heirs his widow Pabalinda de Silva and three sons Don Daniel, Jeronis and Bastian and four daughters Banchohamy, Bahanchihamy, Nonchihamy and Sopichamy. By a family arrangement the three sons were given these two lands while the daughters were given other lands in lieu of their rights in the two lands. Thereafter the three sons Daniel, Jeronis and Bastian amicably divided the two lands into three portions. Bastian took the northern portion, Jeronis the Southern portion and Don Daniel the middle portion which is the corpus in this action in extent 6A. 2R. 24P.

It is admitted that Don Daniel was the original owner of the corpus sought to be partitioned.

The 9th defendant states that Don Daniel and Isohamy who were married in community of property conveyed on deed No. 578 of 27th February 1872 (9D3) to Ketchihamy and Suwaris Appu an undivided one seventh part of the half part of Moragahawatte which half part is in extent five acres and a similar 1/7th share of half part of Alubogahawatte which half part is in extent about four acres. The title cited is right of inheritance from Don Simon.

Ketchohamy and Suwaris Appu by deed No. 8375 of 19.12.1911 (9D4) conveyed their rights to Mangohamy who by deed No. 12624 of 27.10.1914 (9D5) conveyed these rights to Don Elias (22D) and Don Jane who died leaving as her heirs, her husband the 22nd defendant and her children the 9th defendant and 23rd to 26th defendants. Elias the 22nd defendant having died during the pendency of the action, his rights have devolved on his children.

According to the plaintiff the 9th defendant came to the land only recently and despite the protests of her father Saradiel built house No. 4 and went into occupation of it. The 9th defendant stated that he was born on this land and lived there till his father Elias died. The plaintiff in the course of her evidence admitted that the 9th defendant's father Elias and mother Jane Nona lived on the land from the time she came to know things. The plaintiff when she gave evidence was 65 years old. The plaintiff further stated that there was an old house on the land which came down and 9th defendant rebuilt it. This is house No. 4 which the 9th defendant claimed before the surveyor along with latrine No. 7 and well No. 5 and some plantations.

The learned trial Judge has accepted the evidence of the 9th defendant that Elias has been on the land for over fifty years in his own right and that the 9th defendant was born on this land. The Judge has further held that 9D3 relates to the land sought to be partitioned.

The 9th defendant's rights to the land flow from 9D3, 9D4, and 9D5. The Judge's finding is that on these deeds the 9th defendant and the 23rd to 26th defendants are entitled to only a 1/14 shares of the corpus although the contention of the 9th defendant at the trial was that he was entitled to half share of the corpus.

At the argument before us Counsel for 9th defendant-appellant submitted that on these deeds the 9th defendant is entitled to 1/7th share of the corpus because the deeds 9D3, 9D4 and 9D5 convey a 1/7th share and that if a 1/7th share is given to the 9th defendant the plaintiff will not be entitled to any share and thus cannot maintain the action. On this aspect viz. that is if a 1/7th share is given to 9th

defendant that plaintiff will not be entitled to any share, Counsel for appellant was requested to tender written submissions and written submissions have been tendered.

In the written submissions Counsel for appellant has taken up the position that when he said that 9th defendant was entitled to 1/7th share he made a mistake and that in fact 9th defendant is entitled to a 3/14 share. He makes this submission on the basis "that what was transferred on 9D3 was 1/14 of the larger land of 18 acres. When the larger land was divided into three portions the land in suit being 6A.2R.24P. which is roughly equivalent of 1/3 of 18 the fractional entitlement is 3/14 (and not 1/7 as stated by me at the argument)". I have quoted from the written submission tendered by Counsel for appellant.

In 9D3 the description of the lands set out are a half share of the larger land of Moragahawatte and the extent of the half share is given as five acres and a half share of the larger land of Alubogahawatte which half share is in extent four acres. Counsel for appellant conceded that 9th defendant is entitled on 9D3 to 1/14 of the 18 acres which is the larger land. There is no evidence as to the location of this half share of the two lands of the larger land of 18 acres. There is also no evidence that the corpus sought to be partitioned is from this half share of the two lands. The only evidence is that the corpus is a portion of the 18 acres land and it is agreed that 9th defendant is entitled to 1/14 of the 18 acres.

In the Divisional Bench Case of *Girigoris Perera v. Rosalin Perera* (1) it was held by Gunasekera, J. and Choksy, A. J. (Nagalingam, A. C. J. dissenting) that where deeds dealing with shares in an allotment of land purport to convey undivided shares of a larger land of which the allotment had at one time formed a part a Court administering equity has the power in a partition action relating to the allotment to rectify the mutual mistakes of the parties in the description of the property even though no plea of mistake and claim for rectification was set up in the suit.

In this case Gunasekera, J., agreed with the dissenting judgment of Nagalingam, A. C. J., with regard to the interpretation of deeds but went on to state as follows:–

"It seems to me however that rightly understood the controversy with which we are concerned relates not to the construction of a

deed but to the nature and extent of the Court's power to give relief against mistake when it appears that as a result of mutual mistake the parties have expressed in the deed an intention different from their actual intention."

The facts of the Divisional Bench case are shortly as follows:—

The 8th and 9th defendants made conflicting claims in a partition action. They are the children of one Kirinelis who admittedly was entitled to a half share of the land called Goragahawatte depicted in plan P1 filed of record. This lot was part of a larger allotment bearing the same name and at an amicable division effected in 1914 among the co-owners of the larger allotment, a lot was allotted to Kirinelis another co-owner in lieu of their undivided interests. Notwithstanding the division Kirinelis by deed 8D1 of 1914 gifted to the 8th and 9th defendants an undivided 1/10th share of the entirety of the land which was the correct fractional share to which he was entitled to in the entire land, while as stated earlier under the division he became entitled to a half share of the lot in dispute. In 1937 by deed 8D3 the 9th defendant conveyed "an undivided one half of an undivided one tenth share" of the entire land but it should be noted that the 9th defendant was not in possession of any undivided interests in the larger land and that his possession was confined to the divided lot. The 8th defendant claims that the deed was operative to convey to her a half of a half share of the divided lot which would represent the entirety of the interests of the 9th defendant in the land sought to be partitioned; whereas the 9th defendant contends that the deed is effectual to convey only a 1/20 share of the land in dispute though the description of the parcel conveyed by him may relate to the bigger land.

It would be seen from the above facts that when in 1939 by deed 8D3 the 9th defendant conveyed an undivided one half of an undivided 1/10 share of the entire land, the 9th defendant and another co-owner had been given a divided lot in lieu of their shares in the entire land and Kirinelis was entitled to 1/2 share of the divided lot in lieu of his interests in the entire land and he had no interests in the entire land. In this state of the facts Gunasekera, J., held that a Court administering equity has the power in a partition action relating to the divided lot to rectify the mutual mistake of the parties because what

the party intended to convey was half of half of the divided lot which was the subject of the partition action.

In the instant case before us there is no evidence to connect the corpus in the partition action to the half share described in 9D3. The half share described in 9D3 has not been located in the entire land of 18 Acres. The only definite evidence is that according to 9D3 what was conveyed was 1/14 of the larger land of 18 Acres and the corpus sought to be partitioned viz. 6A. 2R. 24P. is a part of the 18 Acres. Therefore the 9th defendant is entitled to only 1/14 of the corpus sought to be partitioned.

In the case before us there is no mistake for the Court to interpret the deed in a way to rectify the mistake.

The general principle is laid down by Bertram C.J. in *Fernando v. Fernando(2)* where he has stated as follows:

> "If I understand these cases aright the principle which they lay down is that a purchaser who acquires an undivided share of a land is only entitled to the same undivided share of any specific portion of the land where the partition of that portion is under consideration. But that is so where other undivided interests come into consideration. Where however two parties have acquired the whole interest of a shareholder in certain proportions and their deeds describe the interest of such a share holder as an undivided interest and it transpires that a specific portion of the land has in fact been held by the person through whom they both claim as his portion for the prescriptive period and the question then arises as to the proportion in which that specific portion has to be divided, it seems to me, that justice requires that as between those parties this specific portion must be divided in the same proportion as those described in their deeds."

Gunasekera, J. in the Divisional Bench case cites with approval the above dictum of Bertram C.J.

In the case before us there are other parties besides plaintiff and 9th defendant who are entitled to undivided shares and there is no mistake in the description of the share. Thus the general principle that a purchaser who acquires an undivided share of the land is only entitled to the same undivided share of any specific portion of such land where the partition of that portion is under consideration has to be applied.

Therefore 9D3 which deals with 1/7 share of a 1/2 share of the larger land will convey only a similar share of the portion that Daniel became entitled to after an amicable partition. Therefore 9th defendant and his brothers and sisters are only entitled to 1/7th of 1/2 or a 1/14 share of the corpus in this case.

I hold that the learned District Judge has come to a correct finding with regard to the interpretation of 9D3 and has not misdirected himself on the law.

In view of the above finding that 9D3 conveys only a 1/14 share of the corpus it is not necessary to consider the further submissions of Counsel for appellant that if the deed conveys only a 1/7th share or 3/14 (according to the written submissions) plaintiff will not be entitled to any share in the land.

The 9th defendant-appellant also claimed title to one acre on deed No. 19480 of 11.12.1920 (9D6) through his mother Jane Nona. By this deed Abraham has conveyed an extent of one acre to 9th defendant's mother Jane Nona. The Judge has held that P1 by which Abraham had disposed of his rights in 1874 has priority over 9D6 and that no right will pass to Jane Nona on 9D6 since Abraham was left with no rights in the land after execution of P1. We have examined the reasons set out by the learned District Judge and we see no reason to interfere with this finding.

Counsel for 9th defendant appellant submitted that as there are certain shares which remain unallotted that the 9th defendant and 23rd–26th defedants be allotted those shares. We do not think that there is any reasonable basis for this submission.

We affirm the judgement of the learned District Judge.

We dismiss appeal No. 694/73 with costs payable by the 9th defendant appellant.

Appeal No. 693/73 has been abated.

GOONEWARDENE, J.—I agree.

Appeal in 694/73 dismissed.
Appeal in 693/73 abated.